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January 15, 2002

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VIA HAND DELIVERY

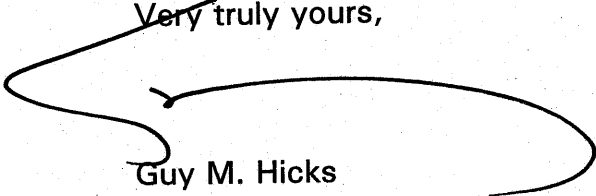
David Waddell, Executive Secretary
Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, TN 37238

Re: *Docket to Determine the Compliance of BellSouth
Telecommunications, Inc.'s Operations Support Systems with State
and Federal Regulations*
Docket No. 01-00362

Dear Mr. Waddell:

Enclosed are the original and thirteen copies of BellSouth's Motion for Reconsideration of the Hearing Officer's Order Regarding AT&T Interrogatory No. 36. Copies of the enclosed are being provided to counsel of record.

Very truly yours,



Guy M. Hicks

GMH:ch
Enclosure

**BEFORE THE TENNESSEE REGULATORY AUTHORITY
NASHVILLE, TENNESSEE**

In Re: *Docket to Determine the Compliance of BellSouth Telecommunications, Inc.'s Operations Support Systems with State and Federal Regulations*

Docket No. 01-00362

**MOTION FOR RECONSIDERATION OF THE HEARING OFFICER'S
ORDER REGARDING AT&T INTERROGATORY NO. 36**

Pursuant to Tennessee Code Annotated §4-5-315, BellSouth Telecommunications, Inc. ("BellSouth") respectfully requests the Tennessee Regulatory Authority ("TRA") to review certain portions of the Hearing Officer's Order on Procedural Matters ("Order") entered in the referenced docket on December 31, 2001. Specifically, BellSouth requests that the TRA review and reverse that portion of the Hearing Officer's order requiring BellSouth to provide, no later than January 18, 2002, "the achieved flow-through rate and the CLEC error excluded flow-through rate for each individual state in Bellsouth's region and for the Bellsouth region in total" for certain enumerated categories. In support of its motion BellSouth states as follows:

Background

On or about September 17, 2001, AT&T Communications of the South Central States, Inc., TCG MidSouth, Inc., and the Southeastern Competitive

Carriers Association ("AT&T") served their first set of interrogatories on BellSouth.

Interrogatory 36 provided:

From January 2001 to present, for each individual state in BellSouth's region and for the BellSouth region in total, please identify the achieved flow through rate and the CLEC error excluded flow through rate, by interface (i.e., LENS, TAG, EDI, and all interfaces) for the following categories:

- a) LNP;
- b) UNE;
- c) Business Resale;
- d) Residence Resale; and
- e) Total (i.e., UNE, Business Resale, and Residential Resale combined)

BellSouth responded, appropriately, as follows:

BellSouth does not produce this data on flow through rates on a per state basis. Please reference the attached file, *TN Docket No. 01-00362 No. 36.x/s*, for the BellSouth for the achieved flow through rate and the CLEC error excluded flow through rate, by interface for the months of January 2001 through August 2001.

This response was appropriate, even with the benefit of hindsight following all of the discussion of this interrogatory, because BellSouth did not have, and still does not have, the results of the computation necessary to answer the interrogatory as posed. In order to respond to the interrogatory as posed, BellSouth would have been required to "manufacture" evidence, the flow-through rates that did not exist at the time of the request. While a request that BellSouth "compile" the underlying data upon which such a computation might have been made might have been objectionable as being unduly burdensome, oppressive and irrelevant, as

Interrogatory 36 was written it should have been sufficient for BellSouth to state, as it did, that it did not have the requested information.

After BellSouth made its response, a supplemental request was posed that provided as follows:

BellSouth states that it does not produce flow through data on a state-specific basis. According to KPMG, however, BellSouth is capable of producing such data. BellSouth, therefore, should either produce the requested data or explain why producing such data is not technically feasible.

To this supplemental request, BellSouth provided a supplemental response that provided:

BellSouth has reviewed the Georgia Third Party Test, Florida Third Party Test Exceptions and Observations as well as the Georgia Third Party Test KPMG Consulting Flow-Through Evaluation Final Report. There is no mention of the state-specific reports or any questions about BellSouth's capability to produce State Specific Reports for Flow-through nor are there any exceptions or observations that addressed this issue. As part of KPMG's Flow-Through Evaluation, they conducted multiple interviews, including 2 with AT&T (one on 01/25/2000 and one date unknown) that are part of KPMG's work papers. BellSouth's position remains the same. AT&T is misinformed on this issue. BellSouth has no record of an issue of state specific reporting capability for Flow-Through Reports in the Flow-through Evaluation (FT-1) conducted by KPMG in their OSS Evaluation for the Georgia Public Service Commission. Unless AT&T can identify the KPMG Exception or Observation as part of either the Georgia or Florida Third Party Test, or indicate where this capability is addressed in the Flow-Through Evaluation Final Report, BellSouth maintains that the Flow-Through Report is a regional report as indicated in the SQM.

Flow through is a measurement of a regional process using ordering systems that are the same throughout the entire region. This measurement has been designed to report flow through results for residence, business, UNEs and LNP and,

within these groupings, by individual CLEC. This measurement as is presently implemented does not further disaggregate flow through results by state. BellSouth has not done an in-depth investigation to ascertain the technical feasibility, cost, or implementation effort associated with the development of state specific reports as requested by AT&T. BellSouth has determined in our preliminary high-level analysis that data collection such as Fatal Rejects, as a category, can only be counted in a regional format. In addition, if technical feasibility could be determined, the development effort to implement such a measurement would require considerable programming effort and its associated costs.

AT&T objected to this response, and eventually the Hearing Officer ordered BellSouth to either produce the requested data, or to state that it was technically infeasible to do so. At that point, BellSouth provided an even more detailed answer to the interrogatory, as follows:

This Second Supplemental Response to AT&T Interrogatory 36 is submitted in accord with the Pre-Hearing Officer's undated order denying BellSouth's Motion to Clarify related to the Pre-Hearing Officer's Order related to BellSouth's response to AT&T's Interrogatory 36.

1. The information requested -- flow-through rates presented on a state-by-state basis from January 2001 to present -- does not exist.
2. The underlying data necessary to calculate such rates does exist, in some form, inasmuch as BellSouth retains information regarding LSRs submitted and information regarding those LSRs in its databases.
3. Since the data does exist in some form, with the appropriate programming work, time and expenditure, a program could be created that could extract such information on a state-by-state basis.
4. BellSouth has researched this matter, and has instructed its affected employees to determine what would be required in

order to do such programming to respond to the subject data request. In response, those BellSouth employees have indicated that if the task were begun on November 30, 2001, it would take until the first week in March, 2002, and at a substantial cost, to accomplish this task, a period of more than 90 days.

5. Based on this analysis of the time required to complete the necessary programming revisions, and to make the required runs, it was not technically feasible for BellSouth to respond to AT&T's interrogatory 36 (even assuming that an interrogatory that requires the production of a report that did not exist could be proper in the first instance), in the time between the point that the interrogatory was posed, September 17, 2001, and the time the response was due, which was originally October 12, 2001. Furthermore, it was not technically feasible to produce the answer in the time between when the interrogatory was posed, and the date scheduled for this hearing to begin, December 3, 2001, even if BellSouth had understood that it might be required to produce a document or result that did not exist at the time the interrogatory was served. Therefore, BellSouth cannot produce the requested information based on technical infeasibility.

6. If required by the TRA, BellSouth will identify the employee who is responsible for this process and whose subordinates' time and availability are determinative in large measure of the time required to complete the tasks required by Interrogatory 36. If the Pre-Hearing Officer determines it to be necessary, BellSouth will bring this employee to Nashville to explain why the preparation of such reports would require the time noted and to answer any questions the Pre-Hearing Officer might have as to the accuracy of these representations.

7. Even though it is not technically feasible to provide the reports that AT&T requested in the time required, BellSouth would make two further observations that appear relevant to the resolution of this matter. First, the absence of state-by-state information on flow-through does not and cannot reflect on the regionality of BellSouth's OSS systems. If such reports did exist, they would in fact be irrelevant and no one, including AT&T, can articulate any reason that would demonstrate to the contrary. AT&T does not, for instance, have ordering centers in Tennessee. Their orders flow from customers located all over

this region into regionalized, and often national, call centers. A residential resale order submitted on behalf of a customer in Tennessee may well come to BellSouth from the same national AT&T call center as would a similar residential resale order submitted for a customer in Florida or anywhere else in the region. AT&T has not, and cannot dispute that ordering is relatively highly regionalized without contradicting the prior sworn testimony of AT&T's witnesses. Just as AT&T's orders originate from regional/national centers, these orders come to regional, not state-specific, BellSouth centers. Of course, flow-through measures what happens in the ordering process.

Importantly, if a CLEC submitted exactly the same type of order at the same time, correctly completed, in all 9 states, the flow-through rate for such orders would be exactly the same in all states. Indeed, the only reason that a flow-through rate will vary from state to state is if the mixture of the type of orders submitted by the CLECs themselves varies from the regional average. The point is, a state-by-state flow-through rate doesn't tell anyone anything about how flow-through is working, but only reflects the business plans of the CLECs in each state, which bears no relationship at all to the regionality of the OSS systems.

The second point is that while BellSouth cannot comply with the Pre-Hearing Officer's order to produce the requested data for the period beginning in January 2001 to present until at least March, 2002, BellSouth acknowledges that it could engage in a manual process that would allow BellSouth to produce a statement of state-by-state flow-through rates for 9 states for a single month by the end of December, 2001, assuming no unforeseen problems arise. What BellSouth would have to do is to take a month, such as October 2001, and manually separate the data for each state in to a separate database. No mechanical means of doing this presently exists. After separating the data into a separate database for each state, each individual database could be run using the current existing programming, and the results would approximate a state specific flow-through rate. BellSouth has not undertaken this manual effort because the production of a single month's results was not what the interrogatory requested nor is it what the Pre-Hearing Officer ordered. Moreover, BellSouth could not have used this manual process to provide the same information

for each of the months requested by AT&T in Interrogatory 36, in the time frames noted above. In fact, it would have taken BellSouth longer to produce the requested rates on a manual basis, than it would have taken to simply do the reprogramming discussed above. Thus, BellSouth might have been able to produce data for a month or two using a manual process, it was simply not technically feasible to provide an answer to Interrogatory 36 in the time available between the time of the request and the hearing in this matter.

BellSouth would produce state-by-state flow through reports as requested in Interrogatory 36 and as ordered by the Pre-Hearing Officer if it were possible to do so. BellSouth would do so even though the production of these reports, as discussed above, would not be relevant or beneficial in addressing the regionality of BellSouth's OSS. State-by-state flow-through reports simply would not tell the Authority anything more than the regional flow-through reports except, perhaps how the CLEC chooses to do business. Indeed, BellSouth would prefer, above all else, to have absolutely no conflicts with the TRA or the other parties to this proceeding relating to the availability and production of data. The simple truth is that the flow-through rates requested do not presently exist, and could only be created, at significant cost, in the manner and within the time frames noted above. Flow-through rates cannot be approximated by any shortcut known to BellSouth and would not offer the Authority any insight into the flow-through process that is not found in the regional reports, if they did exist, other than to reflect the fact that CLECs in different states may have different business plans.

Importantly, and contrary to any adverse implication, BellSouth's three responses were perfectly consistent. The first answer said that BellSouth did not produce the requested information. The second answer indicated that, contrary to what KPMG might have said, BellSouth did not have state-specific flow-through reports or the capacity to produce such reports. The last answer simply provided more detail about BellSouth's position in the first instance, that it did not have the

calculations that AT&T requested, and explained why, even if it was obligated to do so, that it could not have manufactured the required calculations in the time between AT&T's request and the hearing in this case. That response also pointed out the obvious, that such calculations would be irrelevant to the matter at hand.

Thereafter, during the hearing of Phase I of this proceeding, BellSouth produced, at the request of the TRA, Mr. James Saville, an employee of BellSouth knowledgeable about what would be required to manufacture the evidence that the Hearing Officer had ordered BellSouth to produce. Mr. Saville was examined by the parties and by the TRA, and his uncontradicted testimony is a part of the record in this proceeding. That uncontested testimony was that the requested information did not exist, and that it would take several months of programming and testing to manufacture the information requested by Interrogatory 36.

Notwithstanding the uncontroverted testimony of Mr. Saville, the Hearing Officer has now ordered BellSouth to produce the requested evidence within a 45-day period, by January 18, 2002. BellSouth seeks reconsideration of that order.¹ The uncontradicted evidence in the proceeding demonstrates that it is not possible to comply with the arbitrary timeframes established by the Hearing Officer.

¹ BellSouth is diligently working to develop the requested evidence. Indeed, on the same day Mr. Saville testified and the Hearing Officer ordered BellSouth to provide the evidence within 45 days, Mr. Saville was instructed to begin work. BellSouth will continue to work diligently and will present the requested evidence as soon as it is complete, has been sufficiently tested, and BellSouth can state in good faith that the information requested by Interrogatory No. 36 is accurate.

BellSouth therefore requests that the TRA reconsider the Hearing Officer's order and allow BellSouth a reasonable time to produce the information ordered.²

Argument

The Hearing Officer has not concluded, at any point, that the requested information exists, and that BellSouth simply failed to produce it. Consequently, the only relevant question is, having ordered BellSouth to produce the requested material, how long is a reasonable time to allow for its production.

BellSouth produced Mr. James Saville, whose qualifications in this area were not questioned. Indeed, Mr. Saville was the only witness who provided sworn testimony as to how long it would take to produce the information that was sought in Interrogatory 36. His testimony was clear and unequivocal. It would take slightly more than 90 days to produce the requested material. Instead, without any evidence, the Hearing Officer ordered BellSouth to produce the requested information in 45 days. The Hearing Officer's order concluded that 45 days was a reasonable time for a number of reasons, none of which are supported in the record.

First, the Hearing Officer stated that the computer program was not so large as to require a full ninety days to revise it, noting further than not all lines of code would have to be revised. With regard to these two points, no one testified as to

² BellSouth believes that its initial response was appropriate and that it is not required legally to "manufacture" evidence (as opposed to "compiling" evidence) in response to a discovery request. Nevertheless, in compliance with the orders of the Hearing Officer, BellSouth has begun the process of calculating the information requested, which, for all practical purposes just leaves the appropriate time frame for producing the data as the only remaining issue that needs to be reconsidered by the entire TRA.

whether a program with 7800 lines was large or small, and no one contested Mr. Saville's testimony that the entire process, including revising the code, would take more than 90 days. Second, with regard to rewriting every line of the code, what Mr. Saville said when asked whether every line would have to be rewritten was:

Not every line. There's going to be specific modules in that code that are going to need to be modified. One of the issues, though, is that if you change anything in the code, a good programmer is going to make sure that all of the other pieces of code that did not get modified interact with the new code stream that's been introduced to make sure there are not errors.
(Transcript Vol. 1, page 146)

In short, while it might be true that not every one of the 7800 lines of code would have to be rewritten, Mr. Saville, the only expert on the topic at hand, opined that a good programmer would have to at least look at the code to make sure that the changes that were made did not affect other parts of the program. In short, nothing Mr. Saville said in these respects would justify trying to complete this project in 45 days.

Second, the Hearing Officer seemed to assume that an organization as sophisticated as BellSouth could use more programmers to accomplish the task at hand and thereby cut the programming time in half. (Order at page 8). This exact issue was raised with Mr. Saville, when he was asked whether he couldn't assign more programmers to this project and get it done more quickly. He testified that

the answer is we could put several coders on this work. The problem becomes the testing phase, which comes after the code. Individual programmers have different styles that they use when they're -- when they're writing code, and they have a potential to interact with each other -- a code that I write might

interact differently than a code that you write, and the testing phase actually becomes longer. You need to more thoroughly and rigorously test. In this particular instance to put out the code in as timely a fashion as we possibly could, it makes sense to us to actually have one programmer managing that whole code stream. (Transcript Vol. 1, page 147)

Again, the only expert testifying on the subject clearly indicated that it would be less efficient, not more efficient, to put additional programmers on this task. No one qualified to give an opinion on this subject contradicted Mr. Saville, yet the Hearing Officer arbitrarily cut the time Mr. Saville stated was necessary to do this programming by half.

Next the Hearing Officer addressed the testing phase of this process. Without any evidence whatsoever in the record, he concluded that if two people could test the program in 16 days, four employees could reduce the time to 8 days. There is simply no evidence in this record to support such a conclusion. Mr. Saville clearly didn't say that and no one else testified on the subject. In addition, the Hearing Officer concluded that Mr. Saville's claim regarding testing is suspect in "light of the fact that BellSouth's testing procedures necessarily must be well-established and would primarily involve nothing more than a standardized series of samplings." (Order at page 8). It is not entirely clear what the Hearing Officer meant by this, but Mr. Saville, again the only witness testifying on this subject, did not state that this was the case. To the contrary, he very clearly stated that the schedule that he was offering was "aggressive." (Transcript Vol. 1, page 150) There is simply no basis for the Hearing Officer's conclusions in this regard.

Finally, the Hearing Officer concluded that because some employee of KPMG testified that "the flow-through data that's used to create a performance measures report can be broken down by state" that the programming BellSouth contends to be necessary might not be. There is nothing in the record to support this conclusion either. For all this record shows, the KPMG employee might have thought that it would take six months to do this programming. This cannot be a basis for concluding that Mr. Saville's estimate was incorrect.

The bottom line is that Mr. Saville, the only person testifying who was actually qualified to render an opinion on this matter, said that it would take 90 days. He testified that if a shorter time were imposed, he would not be willing to put his name on the result (Transcript Vol. 1, page 151) attesting to the accuracy of the results.

The Hearing Officer, in his order, referenced what he perceived as BellSouth's being "evasive" and BellSouth's "lack of candor."³ Perhaps that perception colored his decision regarding the time allowed to complete this task. Nevertheless, the sworn testimony of the only qualified witness to address this subject supports a period of slightly more than 90 days to complete this project, not the 45 days ordered by the Hearing Officer.

Conclusion

³ BellSouth, of course, objects to these characterizations as being inaccurate. Its answers were accurate. There is no authority cited by any party to indicate that BellSouth can be required to "manufacture" evidence as opposed to compiling existing data. Moreover, when all is said and done, the issue is whether BellSouth is giving its competitors access to its operating systems on a non-discriminatory basis, not whether the flow-through rates from state to state are identical.

Based on the foregoing, the Hearing Officer's order is not based on the evidence in the record of this proceeding, is arbitrary and should be reversed by the TRA. As stated above, BellSouth is diligently working to develop the requested evidence and will provide it as soon as possible. BellSouth regrets that it cannot provide the information requested by Interrogatory 36 within the time ordered by the Hearing Officer.

Respectfully submitted this 15th day of January, 2002

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CERTIFICATE OF SERVICE

I hereby certify that on January 15, 2002, a copy of the foregoing document was served on counsel for known parties, via the method indicated, addressed as follows:

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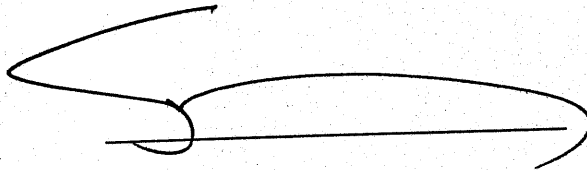
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A handwritten signature in black ink, consisting of a large, stylized 'T' followed by a horizontal line and a small loop at the end.